Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–177 OF 2007
RAMLY ALI J
29 MAY 2008

Companies and Corporations — Directors — Duties — Fiduciary duties — Nature and scope of such duties — Non-executive directors — Duties — Plaintiff volunteering to be director of company — Plaintiff suing to recover director's fees and other payments — Whether plaintiff a director — Whether director's failure to ascertain payment of EPF contributions by company a breach of fiduciary duties

Companies and Corporations — Directors — Meetings — De facto or shadow director — Defendant not playing controlling or commanding role in management of company — Defendant chairing meeting of company's board of directors only once — Whether defendant a de facto or shadow director

Contract — Misrepresentation — Meaning of — Statement of opinion or information — Whether misrepresentation — Claimant failing to specify and plead whether misrepresentation fraudulent, negligent or innocent — Claimant not specifying to what extent misrepresentation relied or acted upon — Claimant not specifying how misrepresentation caused loss or damage — Whether claimant entitled to claim damages for such misrepresentation

The plaintiff alleged that at all material times, he was a non-executive director of the first defendant whereas the second defendant was its de facto director. The plaintiff claimed that the first and second defendants had not paid EPF contributions to the employees of the first defendant. Further, the first and second defendants had through a letter dated 28 August 2006 misrepresented to him the actual amount owing to the EPF, leading the EPF — the third defendant — to initiate recovery action against him for the outstanding contributions due to the employees. The plaintiff claimed that as a non-executive director of the first defendant, he was not obliged to pay the EPF contributions of its employees. The plaintiff sought damages against the first and second defendants for the misrepresentation and failure to pay the EPF contributions to the first defendant's employees. The plaintiff also

A claimed damages for his tarnished good name and reputation as a result of the misrepresentation. The third defendant subsequently withdrew its recovery action against the plaintiff.

B

Held, dismissing the plaintiff's claim with costs:

(1) The plaintiff was in fact and in law a director of the first defendant in accordance with the definition of the word 'director' under s 4 as well as s 122 of the Companies Act 1965. From the documentary evidence adduced, it was clear that the plaintiff had voluntarily offered himself to be a director of the first defendant. He had even taken steps to expedite his appointment to the first defendant's board of directors. Further, the plaintiff had sued to recover payment of his director's fees and other director related expenses. If the plaintiff could seek remuneration as a director, it was only fair and reasonable for him to assume and undertake the responsibilities as a director of the first defendant (see paras 4 & 8–9).

(2) Even if the plaintiff was a non-executive director, his roles and duties were still governed by the Companies Act 1965, in particular s 132. As a non-executive director he was entrusted to look after the affairs of the company and to keep a close watch on the company's managers and other directors in order to safeguard the investment of shareholders. Assuming the plaintiff was a nominee of the second defendant, he would then be a trustee for his principal's interests. By failing to ensure that the EPF contributions had been diligently paid, the plaintiff had breached his fiduciary duties towards his principal — the second defendant (see para 10).

(3) A director not only owes a fiduciary duty to the company but also a duty to act in the company's best interests. The fact that the plaintiff accepted the position of a director implied that he also accepted the attendant fiduciary and statutory duties. The plaintiff had breached his fiduciary duties owed to the first defendant by failing to inquire, ascertain and ensure the statutory EPF payments (see paras 13–14).

(4) The plaintiff's averments and the documentary evidence did not in any way show that the second defendant was in fact and in law a de facto or shadow director of the second defendant. The plaintiff had not adduced any evidence to show that the second defendant had played a controlling or commanding role in the first defendant. The second defendant was also not the first defendant's chairman notwithstanding the fact that he had once chaired a meeting of the first defendant's board of directors. A single meeting chaired by the second defendant did not automatically make him a chairman in perpetuity. The second

defendant was only a shareholder of the first defendant and had no responsibility to pay the EPF contributions (see paras 22–23, 26 & 47).

(5) Misrepresentation means a false representation of a statement or assertion, made by one party to the other. A mere statement of opinion is not a misrepresentation. In the instant case, the second defendant was merely relaying information given him by a third party. He was not making any representation whatsoever concerning the outstanding EPF contributions in the letter of 28 August 2006. The plaintiff, being an advocate and solicitor ought to have clearly understood this. As an advocate and solicitor, the plaintiff could have verified the actual outstanding contributions. The plaintiff had also failed to specify and plead whether the misrepresentation was fraudulent, negligent or innocent. The plaintiff had also not specified to what extent he had relied or acted upon the alleged misrepresentation to his detriment. The plaintiff therefore was not entitled to damages (see paras 30, 41 & 44).

(6) The plaintiff had not shown how his reputation had been damaged by the suit brought by the third defendant, which was in fact withdrawn. The plaintiff had also failed to show, put forward evidence or even indicate the difference between his present reputation and that prior to the third defendant's suit (see para 57).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa pada setiap masa matan, dia pengarah bukan eksekutif defendan pertama manakala defendan kedua adalah pengarah de factonya. Plaintif mendakwa yang defendan pertama dan kedua tidak membayar caruman KWSP kepada pekerja defendan pertama. Bahkan, defendan pertama dan kedua melalui surat bertarikh 28 Ogos 2006 telah memberi gambaran yang salah kepadanya tentang jumlah sebenar yang terhutang kepada KWSP, yang menyebabkan KWSP — defendan ketiga — memulakan tindakan mendapat balik terhadapnya bagi caruman tertunggak yang perlu dibayar kepada pekerja. Plaintif mendakwa sebagai pengarah bukan eksekutif, dia tidak diwajibkan membayar caruman KWSP pekerjanya. Plaintif menuntut ganti rugi terhadap defendan pertama dan kedua kerana gambaran yang salah itu dan kegagalan membayar caruman KWSP kepada pekerja defendan pertama. Plaintif juga menuntut ganti rugi kerana nama baik dan reputasinya yang terjejas akibat misrepresentasi itu. Berikutan itu defendan ketiga menarik balik tindakan mendapat baliknya terhadap plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Plaintif adalah pengarah defendan pertama dari segi fakta dan

undang-undang menurut tafsiran perkataan 'pengarah' di bawah s 4 dan s 122 Akta Syarikat 1965. Berdasarkan keterangan dokumentar yang dikemukakan, ia jelas bahawa plaintif dengan sukarela menawarkan dirinya menjadi pengarah defendan pertama. Dia juga telah mengambil langkah untuk mempercepatkan pelantikannya ke dalam lembaga pengarah defendan. Tambahan pula, plaintif telah menyaman untuk mendapat balik bayaran yuran pengarah dan perbelanjaan pengarah lain yang berkaitan. Jika plaintif boleh mendapat gaji sebagai pengarah, ia hanya adil dan munasabah untuknya memegang jawatan dan mengambil tanggungjawab sebagai pengarah defendan pertama (lihat perenggan 4 & 8–9).

(2) Meskipun plaintif pengarah bukan eksekutif, peranan dan kewajipannya masih dikawal oleh Akta Syarikat 1965, khususnya s 132. Sebagai pengarah bukan eksekutif dia diamanahkan untuk menjaga urusan syarikat dan mengawasi pengurus dan pengarah syarikat yang lain bagi tujuan melindungi pelaburan pemegang saham. Dengan menganggap plaintif adalah calon defendan kedua, dia kemudiannya akan menjadi pemegang amanah untuk kepentingan prinsipalnya. Dengan kegagalan untuk memastikan caruman KWSP telah dibayar dengan teliti, plaintif telah melanggar kewajipan fidusiarinya terhadap prinsipalnya — defendan kedua (lihat perenggan 10).

(3) Pengarah bukan sahaja mempunyai kewajipan fidusiari kepada syarikat tetapi juga kewajipan untuk bertindak demi kepentingan syarikat. Fakta yang plaintif telah menerima jawatan pengarah menandakan yang dia juga menerima kewajipan fidusiari dan statutori lain. Plaintif telah melanggar kewajipan fidusiarinya terhadap defendan pertama kerana gagal bertanya, menentu dan memastikan bayaran statutori KWSP dibuat (lihat perenggan 13–14).

(4) Penegasan plaintif dan keterangan dokumentar tidak dalam apa cara menunjukkan yang defendan kedua dari segi fakta dan undang-undang merupakan pengarah de facto atau bayangan. Plaintif tidak mengemukakan sebarang keterangan untuk menunjukkan defendan kedua telah memainkan peranan yang mengawal atau mengarah dalam defendan pertama. Defendan kedua juga bukan pengerusi defendan pertama meskipun mengikut fakta dia telah sekali mempengerusikan mesyuarat lembaga pengarah defendan pertama. Satu mesyuarat yang dipengerusikan oleh defendan kedua tidak secara automatik menjadikannya pengarah untuk selama-lamanya. Defendan kedua hanya pemegang saham defendan pertama dan tiada tanggungjawab untuk membayar caruman KWSP (lihat perenggan 22–23, 26 & 47).

(5) Misrepresentasi bermaksud representasi palsu kenyataan atau penegasan, yang dibuat oleh satu pihak kepada yang satu lagi. Kenyataan pendapat semata-mata bukan misrepresentasi. Dalam kes

ini, defendan kedua hanya menyampaikan maklumat yang diberikan kepadanya oleh pihak ketiga. Dia bukan membuat representasi yang berkaitan caruman KWSP yang tertunggak dalam surat bertarikh 28 Ogos 2006. Plaintif, yang merupakan peguambela dan peguamcara patut memahami dengan jelas perkara ini. Sebagai peguambela dan peguamcara, plaintif patut boleh mengesahkan caruman sebenar yang tertunggak. Plaintif juga gagal untuk menyatakan dan memplidkan sama ada gambaran yang salah tersebut adalah bersifat fraud, cuai atau tidak bermaksud apa-apa. Plaintif juga tidak menyatakan setakat mana dia bergantung atau bertindak atas misrepresentsi yang dikatakan itu menjejasnya. Plaintif oleh itu tidak berhak kepada ganti rugi (lihat perenggan 30, 41 & 44).

(6) Plaintif tidak menunjukkan bagaimana reputasinya tercemar oleh guaman yang dimulakan oleh defendan ketiga, yang telah ditarik balik. Plaintif juga gagal untuk menunjukkan, mengemukakan keterangan atau menunjukkan perbezaan reputasinya sekarang dan sebelum guaman defendan ketiga (lihat perenggan 57).]

Notes

For cases on directors' duties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 220–232.

For cases on directors' meetings, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 287–289.

For cases on meaning of misrepresentation generally, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4379–4428.

Cases referred to

A Company (No 05009 of 1987) ex p Copp & Anor, Re [1989] BCLC 13 (refd)

Abdul Mohd Khalid Hj Ali v Dato' Hj Mustapha Kamal [2003] 5 CLJ 85 (refd)

Barings Plc, Re (No 5) [2000] 1 BCLC 523 (refd)

CCA Holdings Ltd v Palm Resort Bhd [1998] 4 MLJ 143 (refd)

Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors [1998] 3 MLJ 422 (refd)

Forest of Dean Coal Mining Co, Re (1879) 10 Ch D 450 (refd)

Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor [1978] 1 MLJ 75 (refd)

Hydrodam (Corby) Ltd, Re [1994] 2 BCLC 180 (refd)

Lo-Line Electric Motors Ltd, Re [1988] BCLC 698 (refd)

Law Kam Loy & Arior v Boltex Sdn Bhd & 5 Ors [2005] 4 AMR 525 (refd)

Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627 (refd)

Lembaga Kemajuan Wang Simpanan Pekerja v Rubfil Sdn Bhd & Ors [2005] 7 MLJ 175 (redf)

Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd [2005] 7 MLJ 216 (refd)

Ng Pak Cheong v Global insurance Co Sdn Bhd [1995] 1 MLJ 64 (refd)

Planassure Pac formerly known as Patrick Lee Pac v Gaelic Inns Pte Ltd [2007] SGCA 41; [2007] 4 SLR 513 (refd)
Quah Poh Hoe Peter v Probo Pacific Leasing Pte Ltd [1993] 1 SLR 14 (refd)
Salomon v Salomon & Co Ltd [1897] AC 22 (refd)
Secretary of State for Trade and Industry v Deverell & Anor [2001] Ch 340 (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460 (refd)
Tang Kwor Ham @ Tang Kwor Harm & Ors v Lembaga Kumpulan Wang Simpanan Pekerja [2006] 4 MLJ 261 (refd)
Tay Tho Bok & Anor v Segar Oil Palm Estate Sdn Bhd [1996] 3 MLJ 181 (refd)
Teoh Peng Phe v Wan & Co [2001] 5 MLJ 149 (refd)
Travelsight (M) Sdn Bhd & Anor v Atlas Corp Sdn Bhd [2003] 6 MLJ 658 (folld)
Unisoft Group Ltd, Re (No 3) [1994] BCLC 609 (refd)

Legislation referred to
Companies Act 1965 ss 4, 33(1), 122, 122(1), 132, Form 49
Employees Provident Fund Act 1991 ss 40, 41, 42, 43, 46, 65, 67
Evidence Act 1950 ss 101, 102, 103

Haryati Hashim (Ravi Aida & Partners) for the plaintiff.
Raja Navaratnam (Raja Navaratnam) for the second defendant.

Ramly Ali J:

[1] These grounds of judgment are in respect of the plaintiff's claim against the second defendant (vide encl 1).

[2] The plaintiff had filed this suit on 1 June 2007 stating:

(a) that the plaintiff was at all material times a non-executive director of the first defendant;

(b) that the second defendant is a de facto director of the first defendant;

(c) that the first and second defendants had vide letter dated 28 August 2006 misrepresented to the plaintiff that the actual balance owing for the Employee Provident Fund ('EPF') as at the date of the said letter was RM160;

(d) that the first and second defendants had not taken the appropriate steps/measures to pay the EPF contributions for the employees of the first defendant; and

(e) as a result of the said misrepresentation the plaintiff's good name and reputation had been tarnished.

The plaintiff now comes before this court seeking declarations, amongst others and in particular, against the first and second defendants for damages as a result for the misrepresentation and for failure to pay EPF contributions for the employees of the first defendant.

[3] The basis of the plaintiff's claim herein is that, at all material times he was just a non-executive director of the first defendant and as such he was not responsible to pay EPF contributions for the employees of the first defendant.

IS THE PLAINTIFF A DIRECTOR OR NON-EXECUTIVE DIRECTOR OF THE FIRST DEFENDANT

[4] Based on the whole evidence, the court is satisfied that the plaintiff was in fact an in law a director of the first defendant in accordance with the definition of the word 'director' in s 4 as well as s 122 of the Companies Act 1965 ('CA').

[5] Under s 4, 'director' includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

[6] Section 122(1), provides, inter alia, that every company shall have at least two directors who each has his principal or only place of residence within Malaysia. A director of company shall be a natural person of full age.

[7] In coming to the above conclusion, that the plaintiff was at all material times a director (not a non-executive director) of the first defendant, the court refers to the followings:

(a) resolution dated 11 April 2003 appointing the plaintiff as a director and not as a non-executive director;

(b) Form 49 (in accordance with the CA being register of directors) dated 4 April 2003;

(c) clause 75 of first defendant's memorandum and articles of association;

(d) letters dated 21 February 2003 and 14 March 2003 by the plaintiff firm of Solicitors whom the plaintiff is a partner seeking to convene an extraordinary general meeting for the appointment of directors;

(e) notice to convene an extraordinary general meeting dated 20 March 2003 to appoint the plaintiff as a director and not as non-executive director; and

(f) there is no contract or form of document that the plaintiff is a non-executive director.

[8] From the above mentioned documentary evidence it is axiomatic that the plaintiff had voluntarily offered himself to be a director of the first defendant and had even procured steps to push/expedite for an extraordinary general meeting so as to enable the plaintiff to be appointed to the board of directors. There is not a shred of evidence adduced by the plaintiff to show that the plaintiff was appointed as a non-executive director in the first defendant company to protect the interest of the second defendant.

[9] This court should take judicial notice that the plaintiff had even filed a civil suit against the second defendant for non-payment of director's fees and other expenses in his capacity as a director of the first defendant company vide Kuala Lumpur High Court Suit No S7–22–913 of 2007. Hence if the plaintiff is to be remunerated in his capacity as a director, then it is only fair and reasonable for him to assume and undertake the responsibilities attached to the said position, as a director of the first defendant company.

[10] Even, assuming that the plaintiff is a non-executive director, nevertheless he is still a director in the eyes of the law and his roles and duties are governed by the CA in particular, s 132. Furthermore a non-executive director is entrusted to look after the affairs of the company and to keep a close watch on the company's managers and other directors in order to safeguard the investment of shareholders. Even if the plaintiff is a nominee of the second defendant, then the plaintiff is in fact a trustee for his principal interest and the plaintiff by failing to ensure that the EPF contributions had been diligently paid had breached his fiduciary duties towards his principal, being the second defendant. This, the plaintiff had failed to do as clearly evident from his affidavit in support that he had neither been involved nor had any knowledge of the company's affairs.

[11] In the case of *Lembaga Kemajuan Wang Simpanan Pekerja v Rubfil Sdn Bhd & Ors* [2005] 7 MLJ 175, the late Abdul Wahab Said Ahmad J held (at p 178):

> The directors be they as nominees, sleeping directors or non-active directors owe a duty to see the company's employees EPF be protected. As directors of the company whether as active, nominee, sleeping or non-active director all of them are jointly and severally liable.

[12] It is trite law that the affairs of the company, as a separate legal entity, are managed by the directors of the company. The directors of the company are appointed either by the shareholders pursuant to the company's

memorandum and articles of association and upon such appointment the directors are vested with power and control over the company's affairs (see *Salomon v Salomon & Co Ltd* [1897] AC 22 and *Abdul Mohd Khalid Hj Ali v Dato' Hj Mustapha Kamal* [2003] 5 CLJ 85).

[13] A director not only owes a fiduciary duty to the company but also a duty to act in the company's best interest. These fiduciary duties are owed by the director to the company as a separate legal entity, rather than to the shareholder in their individual capacity. It cannot be denied that equitable principles are imposed by the court. In this regard, s 132 of the CA is referred hereto. The mere fact that the plaintiff had accepted the position of a director impliedly warrants that he accepts the responsibilities together with its fiduciary and statutory duties. The plaintiff as a director must exercise reasonable diligence in performing his duties whilst in office, in the case of *Re Forest of Dean Coal Mining Co* (1879) 10 Ch D 450 Jessel MR stated:

> Directors are bounds, no doubt, to use reasonable diligence having regard to their position, though probably an ordinary director, who only attends at the board occasionally, cannot be expected to devote as much time and attention to the business as the sole managing partner of an ordinary partnership, but they are bound to use fair and reasonable diligence in the management of the company's affairs, and to act honestly.

[14] Hence, even if the plaintiff had held out himself as a non-executive and nominee director to the second defendant, it is still the plaintiff's responsibility and fiduciary duty to ensure payments of EPF contributions and to exercise reasonable diligence, whether he is actually involved or not with the first defendant's affairs as he has a statutory duty to do so. To allow the plaintiff to shield himself by asserting that he is not responsible to act upon his statutory duties and to monitor and/or ensure the payment of EPF contribution whilst in office will most certainly lead to a flood of cases of non-payment of EPF contributions or other statutory payments such as corporate taxes as directors will then just shift the burden of remittances to shareholders and other persons to escape any liability or even prosecution from the authorities.

[15] A company incorporated under the CA has a separate legal entity distinct from that of its members and the company can only act through its directors or officers who have been given authority to act. It is trite law that the assets and liabilities of the company rests with the company and does not extend to the shareholders. If the company breaches its contracts or incurs legal liabilities, the company must be sued and not its members.

IS THE SECOND DEFENDANT A DE FACTO OR SHADOW DIRECTOR OF THE FIRST DEFENDANT

[16] The plaintiff in its originating summons and affidavit in support (encl 2) had alleged that the second defendant is a de facto director whilst in their first affidavit in reply (encl 9) and second affidavit in reply (encl 12) the plaintiff alleged that the second defendant is a de facto and shadow director of the first defendant. Even in the plaintiffs submissions, they had elected to refer to the second defendant as a de facto/shadow director. With these assertions, it remains questionable as to what role the second defendant did in fact undertake as there is a difference between a de facto director with that of a shadow director,

[17] Millett J in the case of *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 had laid down the differences between a de facto director and a shadow director in the following passages:

> A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.
>
> A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behavior in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.

[18] In the case of *Re Lo-Line Electric Motors Ltd* [1988] BCLC 698, Millet J held:

> In order to establish that a person was a 'shadow director' as defined in s 22(6) of the 1986 Act there had to be proof of a pattern of conduct in which a de jure director of a company was accustomed to act on the instructions or directions of

the alleged shadow director and in order to establish that a person was a de facto director it was necessary to show that he undertook functions in relation to the company which could properly be discharged only by a director. The test for a shadow director was not satisfied if all that could be shown was that a de jure director acted on the instructions or direction of the alleged shadow director in relation to one event at the end of the company's life.

[19] In *Re Unisoft Group Ltd (No 3)* [1994] BCLC 609, the court held (at p 620):

In relation to a company 'shadow director' means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors on advice given by him in a professional capacity. In my view, there can be no way in which the acts of any one of the several directors of a company in complying with the directions of an outsider could constitute that outsider a shadow director of that company. Of course, if the board of the company be one person only and that person is a 'cat's paw' for an outsider, the outsider may be the shadow director of the company. But in a case such as this, with multimember board, unless the whole of the board, or at the very least a governing majority of it — in my belief whole, but I need not exclude a governing majority — are accustomed to act on the directions of an outsider, such an outsider cannot be a shadow director. Further, there must be as I say, more that one act and a course of conduct.

(See also *Re a Company (No 05009 of 1987) ex p Copp & Anor* [1989] BCLC 13).

[20] In another case, *Secretary of State for Trade and Industry v Deverell & Anor* [2001] Ch 340, the court held as follows:

In all cases in which it is alleged that a person is a de facto director it must be shown that (1) the person was involved in the company's major financial decisions and (2) that the person performed functions that were consistent only with acting as a director and could not have been performed by a person in a managerial or some other role below board level.

[21] In the present case, the plaintiff's allegations that the second defendant was a de facto or shadow director of the first defendant are based on the following documents:

(a) Minutes of extraordinary meeting held 4 April 2003 wherein the second defendant had allegedly chaired the said meeting. It is pertinent to note that the said minutes were never signed by the second defendant and to date no evidence has been adduced to the contrary by the plaintiff despite being challenged by the second defendant.

(b) Letter from Syarikat Pesaka Antah Sdn Bhd discharging Messrs Ravi, Beltran & Co (actma as a firm) from acting as solicitors and not the plaintiff, signed by the second defendant in his capacity as executive director of Syarikat Pesaka Antah and not the first defendant. In fact there is no mention of the first defendant whatsoever in the said letter and therefore the said letter has no bearing/basis in this case by any measure.

(c) Deed of settlement of agreement dated 22 April 2005 between the first defendant and second defendant.

[22] The averments made by the plaintiff and the documents exhibited herein do not in any way show that the second defendant was in fact and in law a de facto or a shadow director. This finding derives its strength from the followings:

(a) para 8 of the plaintiffs affidavit in support states that he was appointed to look after the second defendant's interest. There is no averment whatsoever that the second defendant had all along instructed the plaintiff to carry out his functions;

(b) the plaintiff by his own averments in his affidavit in support had stated that he was never involved in the company. Hence, he had not carried out any instructions or directions from the second defendant thereby fortifying the fact that the second defendant is not a de facto director;

(c) there is not a shred of evidence adduced that there is a pattern that the second defendant is a de facto or a shadow director;

(d) the circular resolution in exh 'P-2' of the plaintiff's affidavit in support merely states that the plaintiff and, one, Narayan Lakshimi Anthony are to protect the interest of the second defendant. This does not show or prove that the second defendant is a de facto or a shadow director;

(e) the plaintiff had failed to act diligently and was in fact negligent in not looking after the second defendant's interest despite having voluntarily undertaking to look after the second defendant's interest;

(f) that one Mr Khoo Swee Tiong was at all material times in charge of the first defendant's affairs; and

(g) affidavit sworn by the said Narayan Lakshmi Anthony affirmed on 3 March 2008 where the averment of the deponent were that the second defendant was never involved in the management and affairs of the company, were never specifically replied thereto by the plaintiff.

[23] The plaintiff had not adduced any evidence to show that the second defendant had played a controlling or commanding role in the first defendant

company, thereby failing to discharge the burden of proof lies on him. Burden of proof as contained in s 101 of the Evidence Act 1950 of establishing a case rests throughout the proceedings on the party who assert the affirmative of the issue. Under ss 102 and 103 of the same Act, if the party with whom the onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or give evidence which is not sufficient, such party must fail.

[24] In the present case the plaintiff had failed to plead, state and prove the following:

(a) that the second defendant had negotiated for and on behalf of the company;

(b) that the second defendant played in a prominent role in the company;

(c) that the second defendant was responsible for the company's affairs and management; and

(d) most importantly that the second defendant had 'bossed' the directors who customarily submitted to his requirements.

IS THE SECOND DEFENDANT, THE CHAIRMAN OF THE FIRST DEFENDANT

[25] At one stage of the submissions, the plaintiff raised the issue that the second defendant was the chairman of the first defendant company in order to show the role played by the second defendant in the first defendant. In this case, the second defendant was, based on the plaintiff's own evidence and exhibit, sat as chairman to chair their meetings, on the invitation of the first defendant's board of directors in tandem with the company's memorandum and articles of association.

[26] It is pertinent to note that pursuant to Article 96 of the company's memorandum and articles of association, the board of directors shall elect a chairman at their meetings. Hence, the second defendant was in fact only elected to chair the meeting on the invitation and appointment from the board of directors. A single meeting if chaired by the second defendant does not automatically make the second defendant a chairman in perpetuity. A chairman of a meeting is different from a chairman of the company.

[27] It is also trite law, that the acts and appointments of the company is governed by the company's memorandum and articles of association and is the present case a perusal of the same does only provide for the appointment of a chairman at board meetings. Hence, any other assertion or acts undertaken which are not in accordance with the company's memorandum

and articles of association is void and unenforceable and has no legal basis as the said memorandum and articles of association constitute a contract between the company and its members as stated in s 33(1) of the CA.

ISSUE OF MISREPRESENTATION

[28] It is the plaintiff's assertion, that the second defendant together with the first defendant had misrepresented to the plaintiff that the EPF contributions were in fact paid when they were not done accordingly.

[29] In order to prove misrepresentation the plaintiff must show that the second defendant had represented a statement of fact, such being a positive assertion that the second defendant believes was not true (see *Tay Tho Bok & Anor v Segar Oil Palm Estate Sdn Bhd* [1996] 3 MLJ 181.

[30] Misrepresentation means a false representation of a statement or assertion, made by one party to the other. A mere statement of opinion proved to be unfounded, is not misrepresentation. Referring to Pullock & Mulla, *Indian Contract and Specific Relief Acts* (10th Ed) at p 187, the leading authors had stated:

> Statements of opinion or intention may not amount to representations where the maker of the statement had no real knowledge or was simply passing on information.

[31] The Court of Appeal in *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460 held (at p 465):

> Now the elements of an actionable misrepresentation are well settled. They are set out as follows in Professor McKendrick's *Contract Law* (3rd Ed), a leading work on the subject:
>
> > A misrepresentation may be defined as an unambiguous, false statement of fact which is addressed to the party misled and which materially induces the contract.The first is that the representation must be an unambiguous false statement of fact, the second is that it must be addressed to the party misled and the third is that it must be a material inducement to entry into the contract.

[32] It is reiterated here, that the second defendant had clearly stated that he was merely reiterating what was advised to him by Khoo Swee Tiong and hence was not making any representation whatsoever. He was merely passing on the information that he has obtained from Khoo Swee Tiong to the plaintiff. That does not amount to misrepresentation.

[33] In the case of *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75, His Lordship Ibrahim J quoted *Gatley on Libel and Slander* (7th Ed) as follows:

> ... Words are normally construed in their natural and ordinary meaning, ie in the meaning in which reasonable men of ordinary intelligence, of worldly affairs, would likely to understand them. The natural and ordinary meaning may also include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words...

[34] In the letter dated 28 August 2006 (exh 'P-6', encl 2) the second defendant had expressly stated that his information was based on the representation made by the director of the first defendant, Mr Khoo Swee Tiong to him.

[35] The relevant paragraph of the said letter dated 28 August 2006 from the second defendant to the plaintiff is reproduced below:

> With reference to the letter of demand from Messrs Ariffin Raj De Silva & Associates which was enclosed with your letter, I am advised by Khoo Swee Tiong that the actual balance outstanding is RM160 which is confirmed in a document from EPF and attached herewith for your records. This suggests that there may be an error on the part of EPF in computing the amount owed and therefore, the letter of demand in question may not have stated the correct amount.

[36] In applying its natural and ordinary meaning, it would be that the second defendant was not making any representation whatsoever regarding the outstanding balance of the EPF contributions and this was clearly understood by the plaintiff, more so when the plaintiff is an advocate and solicitor. In addition, the plaintiff vide his solicitors letter dated 19 September 2006 (exh 'P-7', encl 2) had accepted that the fact that the second defendant 'was advised by Khoo Swee Tiong' and it was not the second defendant that made any representation on his own accord as to any fact, opinion or even expression. Moreover, the second defendant also cannot be said to have misrepresented vide his letter dated 28 August 2008 that the sum owing was RM160 in respect of the EPF contributions as the EPF vide letter dated 4 April 2006 (exh 'P-6', encl 2) had confirmed that RM160 was in fact the true and accurate sum outstanding.

[37] In addition to the above, the plaintiff, as an advocate and solicitor and a director of the company at the material time could have made the necessary inquiry with the EPF so as to ascertain the actual EPF contributions that were outstanding. In the Singapore Court of Appeal case of *Quah Poh Hoe Peter v Probo Pacific Leasing Pte Ltd* [1993] 1 SLR 14, it was held, inter alia (on an

allegation by the plaintiff that the first defendant had misrepresented the existence of a company), that whether or not the entity concerned was incorporated as a company under the Companies Act 1965 is a fact which could be objectively established by making a simple search at the Registry of Companies.

[38] In *Travelsight (M) Sdn Bhd & Anor v Atlas Corp Sdn Bhd* [2003] 6 MLJ 658, Abdul Malik Ishak J (now JCA) held (at p 667):

> In simple language, a misrepresentation is a representation that is untrue. It is a false statement made by one party to the contract to the other, before, or at the time of contracting, on which that other party relied on in contracting.

[39] Applying the above principle to the facts of this case, it is clear that the second defendant had not made any representation (as alleged by the plaintiff) let alone misrepresentation. The plaintiff had not pleaded the following:

(h) whether the plaintiff had relied on the second defendant's letter;

(i) whether the plaintiff was induced to enter any contract as a result of the said letter;

(j) whether the second defendant had made a fraudulent, negligent or innocent misrepresentation; and

(k) whether the plaintiff had suffered losses to entitle him to any damages.

[40] In the Court of Appeal case of *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460, Gopal Sri Ram JCA delivering the judgment of the court held (at pp 466–467):

> As a general rule, the burden is on the representee to show that the misrepresentation induced him to enter into contract.

Further down His Lordship held (at p 468):

> Now, it is trite that the expression 'misrepresentation' is merely deceptive of a false pre-contractual statement that induces a contract or other transaction... Put it another way, a misrepresentation is innocent where the representor believes his assertion to be true and consequently has no intention of deceiving the representee.

And later on, the court also held (at p 470):

> In the case of an innocent misrepresentation, our law is the same as that of England before the passing of the Misrepresentation Act 1967 in that country. A representee who has been induced by an innocent representation may sue for recession and consequent restitution; but he may not recover damages. This principle is based on the historical antecedent that a Court of Equity will only decree specific relief but not damages, the latter being the sole relief that Courts of Common Law will grant.

[41] In the present case, the court finds that the plaintiff had failed to specify and plead clearly whether the second defendant had made a fraudulent, negligent or innocent misrepresentation. To succeed in establishing fraudulent misrepresentation, it is incumbent on the plaintiff to prove the same beyond reasonable doubt, such prove which has not been forthcoming or even present by any standards based on the affidavits filed herein.

[42] In the case of *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627, Abdul Malik Ishak J (now JCA) held (at p 645):

> In my judgment, to succeed on the ground of fraud and/or fraudulent misrepresentation, the defendant must prove beyond reasonable doubt that there must be clear, cogent, direct and unequivocal evidence of both fraud and/or fraudulent misrepresentation. Unless there was such evidence, the court was not in a position to make a finding as to fraud or, for that matter, fraudulent misrepresentation. One must be clear in approaching the issue of fraud in that fraud is not a matter of inference or mere simple deduction.

[43] In the case of *Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd* [2005] 7 MLJ 216, again Abdul Malik Ishak J (now JCA) held (at p 226):

> In my considered view, damages, subject to proper pleading and proof, can be claimed for breach of contract. But, in the absence of fraud or negligence, there can be no damages for innocent misrepresentation. If neither negligence nor fraud is alleged with the relevant particulars, just like the present case at hand, then the alleged misrepresentation is an innocent misrepresentation and it does not attract any award of damages. In the present case, the plaintiff's amended statement of claim, similarly alleges neither fraud nor negligence.

[44] The second defendant in the present case in fact did not make any representation whatsoever but merely communicated to the plaintiff as to what was informed to him by Khoo Swee Tiong. Whilst the plaintiff had alleged misrepresentation, it had not been stated as to what extent the plaintiff had relied and acted on the said statement and suffered losses as a result of the said alleged statement. Hence, the plaintiff is not entitled to damages.

A PAYMENT OF EPF CONTRIBUTIONS

[45] The right of bringing on action against the plaintiff was initiated by the third defendant (EPF) and was not as result of the second defendant's actions and/or representation. Sections 65 and 67 of the Employees Provident Fund Act 1991 clearly stipulates that the right is with the EPF Board. Hence whatever action brought by the EPF under its mistaken belief cannot be put on the shoulders of the second defendant as the second defendant has no right by any measure to direct and control the actions undertaken by the EPF. Furthermore s 46 of the same Act provides for the EPF to initiate action against the plaintiff as the plaintiff is in fact a director, by whatever name he is called, of the first defendant. The plaintiff in initiating and accepting his appointment as a director of the first defendant has to be responsible for his statutory obligations. If the plaintiff was not willing to carry out his fiduciary and statutory obligations, he should not have accepted his position as a director of the first defendant.

[46] In the case of *Tang Kwor Ham @ Tang Kwor Harm & Ors v Lembaga Kumpulan Wang Simpanan Pekerja* [2006] 4 MLJ 261, Low Hop Bing J (now JCA) held that pursuant to s 46 of the Employees Provident Fund Act 1991, the directors of a company at the material time are liable for the contributions and not anyone else such as shareholders.

[47] Sections 40, 41, 42 and 43 of the Employees Provident Fund Act 1991 stipulates that the responsibility of EPF contributions is on the employer, in this case being the company. Hence, the plaintiff's assertion and demand that the second defendant should pay the EPF contribution is without basis and wholly unsustainable. The second defendant is only a shareholder and hence bears no responsibility towards payment of EPF contributions. It is pertinent to note that the language contained in the said Act is neither ambiguous nor absurd and hence a strict and literal interpretation is required.

[48] It is trite law that a company incorporated under the Companies Act 1965 is a separate legal entity, distinct from its members and officers. Since the onus of EPF payments is on the company (the first defendant) and the second defendant cannot be made liable for payments of EPF contributions let alone the responsibility to ensure payments for the same as that would tantamount to interfering with the company's affairs. Referring to the case of *Law Kam Loy & Arior v Boltex Sdn Bhd & 5 Ors* [2005] 4 AMR 525, Gopal Sri Ram JCA, went on to quote the words of Lord Halsbury in the case of *Salomon v Salomon & Co Ltd* [1897] AC 22:

> ... that once a company is legally incorporated it must he treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

[49] Section 46 of the Employees Provident Fund Act 1991 clearly provides that the directors of a company are jointly and severally liable for contributions. Whilst the plaintiff alleges that he is a non-executive director (though no evidence whatsoever has been adduced). Section 4 of the Companies Act 1965 expressly states 'director' includes any person occupying the position of director of a corporation by whatever name called ...'.

It is axiomatic that the plaintiff has a statutory responsibility by virtue of his office to ensure if not inquire if the first defendant had in fact paid the EPF contributions.

[50] In the case of *Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149, Kang Hwee Gee J held:

> A director owes a fiduciary duty to act honestly in the interest of the company. This principle is inscribed in s 132(1) of the Act which states that:
>
> > A Director shall at all times act honestly and use reasonable diligence in the discharge of his office.

[51] In *Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* [1998] 3 MLJ 422, Kamalanathan Ratnam J (as he then was) held (at p 439):

> It is my judgment that the duties of a director are those fiduciary duties owed by senior officials of the company and as such are higher than those owed by employees and managers. This is because a director is not an employee but is the alter ego of the company and as such should be placed in the category of employers and not a employees. Generally, the duty placed on director is a duty of fidelity and good faith based on a relationship founded on an element of trust.

[52] In *Ng Pak Cheong v Global insurance Co Sdn Bhd* [1995] 1 MLJ 64, Mohamed Dzaiddin FCJ in delivering the judgment of the apex court held (at p 77):

> In *Australian Growth Resources Corp Pty Ltd v Van Reesma* (1988) 13 ACLR 261, it was observed:
>
> > The relationship of a director to the company is fiduciary in character. The primary consequence of this principle is that a director is bound to exercise the powers and discretion conferred upon him bona fide in the interests of and for the benefit of the company as a whole...

[53] It is pertinent to note that at all material times the plaintiff had failed to make any inquiries and/or to take any reasonable steps to ensure the said EPF contributions during his tenure (and even thereafter) as director thereby breaching his fiduciary duties. On one hand the plaintiff claims that he was appointed to look after the interest of the second defendant and has to date filed a claim for vide Kuala Lumpur High Court Suit No S7–22–913 of 2007 for directors remuneration yet on the other hand he contends that he was never involved with the first defendant in any respect whatsoever, if the plaintiff was never involved, then it is highly suspicious and questionable as to his assertion that he was appointed to protect the second defendant's interest and also as to why he should be paid director's remuneration, in this regard, that plausibility must be tested against veracity.

[54] The plaintiff owed a fiduciary duty to protect the interest of the company and in falling to do so had breached his duty of care towards the first defendant which he had owed in his capacity as director by failing to even inquire, ascertain and ensure statutory payments.

[55] In the recent Singapore Court of Appeal case of *Planassure Pac formerly known as Patrick Lee Pac v Gaelic Inns Pte Ltd* [2007] SGCA 41; [2007] 4 SLR 513 , the highest court in Singapore held:

> ... The nub of the issue is whether they remained under a duty to take positive steps to ensure that the accounts were in order (at least on their face), despite their designation as nonexecutive directors. This question ought to be answered in the affirmative. As pointed out by the court in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162, every director of a company, regardless of whether he has *an executive or non-executive* designation, has fiduciary duties and legal responsibilities to his company.
>
> Thus, the mere fact that Crowhurst, Lew and Shaw were non-executive directors of the material time and took a backseat in the management of the company did not exempt them from the need to exercise a modest level of scrutiny as to the goings-on in the respondent.

Further on the Appeals Court held:

> A director cannot now be viewed as mere sentinel who may occasionally dose off at his post. Directors are officers who must remain alert and watchful at the helm. Directors ought to have an inquiring, though not necessarily suspicious, mind in discharging their supervisory function.

[56] In the case of *Re Barings Plc (No 5)* [2000] 1 BCLC 523, the English Court at Appeal had held as follows:

(i) Directors have, both collectively and individually, a continuing duty to

acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as director.

(ii) The exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated function,

IS THE PLAINTIFF ENTITLED TO DAMAGES

[57] The plaintiff whilst claiming for damages for loss of reputation had failed to specify as to what damages is being sought. Furthermore the plaintiff had not demonstrated or adduced any proof to this court as to how the plaintiff's reputation had been affected as a result of the suit or action brought about wholly by the third defendant (EPF) owns initiation. Further, the plaintiff had failed to adduce any evidence as to how he had suffered any pecuniary loss. The plaintiff had also failed to show, put forward evidence or even indicate the difference between his present reputation and that of his prior to the said suit commenced by the third defendant (EPF) against him.

[58] In the case of *CCA Holdings Ltd v Palm Resort Bhd* [1998] 4 MLJ 143, James Foong J (now JCA) held (at p 148):

> Under the common law, the courts have denied the granting of damages for loss of credibility and reputation.

[59] It is also pertinent to note that the third defendant (EPF) had *withdrawn* the said suit or action against the plaintiff and further the plaintiff had failed to prove any loss as a result of the said suit.

CONCLUSION

[60] On the above considerations the court rules that the plaintiff has failed to prove his claim against the second defendant. Therefore, the plaintiff's claim against the second defendant is dismissed with costs to be paid by the plaintiff to the second defendant.

Claim dismissed with costs.

Reported by Andrew Christopher Simon